

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>CAROL SWITZER</b>	)	
Claimant	)	
VS.	)	
	)	
<b>DILLON COMPANIES</b>	)	Docket No. 1,060,004
Self-Insured Respondent	)	

**ORDER**

Claimant appealed the May 29, 2013, Award entered by Special Administrative Law Judge (SALJ) C. Stanley Nelson. The Board heard oral argument on September 20, 2013, in Wichita, Kansas.

**APPEARANCES**

Melinda G. Young of Hutchinson, Kansas, appeared for claimant. Matthew J. Schaefer of Wichita, Kansas, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, the parties stipulated the Board may consider the *Guides*.<sup>1</sup>

**ISSUES**

SALJ Nelson denied compensation in this claim for a September 10, 2011, injury by accident, determining that claimant failed to prove as a result of her injury that she sustained a right lower extremity permanent functional impairment or is in need of additional medical treatment.

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<sup>1</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Claimant contends she proved she sustained a 20% permanent functional impairment to the right lower extremity as a result of her work injury.

Respondent contends claimant did not sustain a functional impairment due to her workplace fall and failed to prove she is entitled to future medical benefits.

The issues before the Board on this appeal are:

1. Did claimant sustain a permanent partial functional impairment to the right lower extremity as the result of her work-related injury on September 10, 2011? If so, what is the nature and extent of claimant's disability?
2. Did claimant prove she is in need of future medical treatment?

#### **FINDINGS OF FACT**

After reviewing the entire record and considering the parties' arguments, the Board finds:

The SALJ's Award sets out findings of fact that are detailed, accurate and supported by the record. It is not necessary to repeat those findings herein. The Board adopts the SALJ's findings of fact as its own as if specifically set forth herein.

#### **PRINCIPLES OF LAW AND ANALYSIS**

1. Did claimant sustain a permanent partial functional impairment to the right lower extremity as the result of her work-related injury on September 10, 2011?

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>2</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."<sup>3</sup>

Dr. Brennen Lucas, respondent's expert, used the passive method to measure claimant's loss of range of motion. Dr. Lucas, an orthopedic specialist, explained that the

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<sup>2</sup> K.S.A. 2011 Supp. 44-501b(c).

<sup>3</sup> K.S.A. 2011 Supp. 44-508(h).

active method of measuring range of motion is where the patient, without assistance, moves the joint. The patient moves the joint as far as possible and the physician measures the range of motion. When the passive method is utilized, the physician moves the patient's joint and measures the range of motion. Dr. Lucas testified the passive method is easier to reproduce. If the passive method is performed on an individual 10 times, the results will be within a few degrees all 10 times. If the active method is used, the results may be inconsistent. When Dr. Lucas tested claimant, she had 110 degrees of flexion in the right knee and 116 degrees of flexion in the left knee. According to Dr. Lucas, those findings did not warrant an impairment rating.

Dr. Justin Strickland, an orthopedic physician, performed an independent medical evaluation of claimant pursuant to an order by SALJ Nelson. He used the passive range of motion and measured claimant's right knee flexion at 115 degrees. The doctor acknowledged the flexion in his average patient's knee is 130 degrees. However, claimant is 5'1" tall and weighs 270 pounds and a person with a large thigh and calf can have a limited range of motion.

Dr. George G. Flutter, claimant's expert, assessed claimant with status post work-related injury, right knee pain, right knee contusion and possible right knee internal derangement. Dr. Flutter, a physical medicine and rehabilitation physician, used the active method to measure claimant's range of motion. Dr. Flutter indicated claimant's right knee flexion was 95 degrees. Table 41 in Chapter 3 of the *Guides* provides that an individual with less than 110 degrees of flexion, but more than 80 degrees of flexion falls in the mild category, or a 10% functional impairment to the lower extremity at the level of the knee. Dr. Flutter testified claimant lacked 10 degrees of full extension, which represents a flexion contracture. Table 41 of the *Guides* provides that an individual who has 10 to 19 degrees of flexion contracture has a 20% functional impairment to the lower extremity at the level of the knee. Dr. Flutter chose to assign claimant a 20% functional impairment to the right lower extremity at the level of the knee.

All three physicians used Table 41 of the *Guides* to rate claimant's functional impairment. However, Dr. Flutter was the only physician who utilized the active range of motion as required by the *Guides*. The *Guides*, at page 3/14, states:

The tables of Chapter 3 are based on the *active* range of motion, which is determined with the patient's full effort and cooperation. The recommended tests should be performed and reported according to *Guides* recommendations, so they can be repeated by others and the results compared. Comparing the patient's active range of motion with the passive range of motion provides useful information.

Evaluating the range of motion of an extremity or of the spine is a valid method of estimating an impairment. To some extent, however, the range of motion is subject to the patient's control. The results of such evaluations should be

consistent and concordant with the presence or absence of pathologic signs and other medical evidence.

K.S.A. 2011 Supp. 44-510e(a)(2)(B) states:

The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

Respondent argued at oral argument that a claimant can manipulate the active range of motion by limiting his or her movements. Conversely, when a passive range of motion is used, a claimant cannot purposefully limit his or her movement. There is, however, no evidence in the record that claimant manipulated her range of motion by self-restricting her movement or failing to give a full effort.

Drs. Lucas and Strickland failed to use claimant's active range of motion to ascertain her functional impairment. The Board is bound by K.S.A. 2011 Supp. 44-510e(a)(2)(B) to use the *Guides*. However, while Dr. Flutter correctly measured claimant's active range of motion, his opinion that claimant sustained a 20% functional impairment to the right lower extremity at the level of the knee is excessive.

The Board is mindful that October 4, 2011, x-rays of claimant's right knee showed no fracture or dislocation and an October 13, 2011, MRI revealed no torn ligaments or meniscus, nor any significant internal derangement. Also, claimant did not use an assistive device when seen by Dr. Flutter. *Tovar*<sup>4</sup> allows an ALJ and the Board to determine the nature and extent of claimant's disability based upon the evidence that was presented. Based upon the evidence, the Board finds that claimant sustained a 10% functional impairment to the right lower extremity at the level of the knee, as she had 95 degrees of flexion.

2. Did claimant prove she is in need of future medical treatment?

Dr. Lucas opined that claimant needs no further medical treatment. Dr. Strickland indicated that Tylenol, ibuprofen, heat and cold packs were reasonable treatments for claimant's right knee arthritis. However, Dr. Strickland opined claimant's right knee arthritis was not work related and, therefore, claimant's injury was not the prevailing factor causing her need for medical treatment.

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<sup>4</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

Only Dr. Fluter recommended ongoing medical treatment for claimant's work-related right knee injury. Dr. Fluter recommended a repeat MRI, medications to improve claimant's pain symptoms, lower extremity electrodiagnostic studies, a sleeve or soft brace, pool-based physical therapy and possible injections and orthopedic reevaluation. However, Dr. Fluter was not asked to give an opinion as to whether claimant's injury was the prevailing factor causing her need for the recommended medical treatment. Moreover, Dr. Fluter largely ignores the fact that claimant had degenerative arthritis in her right knee.

The Board agrees with the SALJ that claimant failed to prove that her injury was the prevailing factor causing her need for future medical treatment. The Board finds most credible the opinion of Dr. Strickland that claimant's preexisting degenerative right knee arthritis is the cause for her need for medical treatment.

### **CONCLUSION**

1. Claimant sustained a 10% functional impairment to the right lower extremity at the level of the knee.

2. Claimant failed to prove that her injury by accident was the prevailing factor causing her need for future medical treatment.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>5</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

### **AWARD**

**WHEREFORE**, the Board modifies the May 29, 2013, Award entered by SALJ Nelson by finding claimant has a 10% functional impairment to the right lower extremity at the level of the knee. Therefore, based upon an average weekly wage of \$475.45, claimant is entitled to 20 weeks of permanent partial disability benefits at the rate of \$316.98 per week, or \$6,339.60, all of which is due and owing, less any amounts previously paid. The Board adopts the remaining orders set forth in the Award to the extent they are consistent with the above.

Should claimant's counsel desire attorney fees be approved in this matter, she may submit that matter to the SALJ.

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<sup>5</sup> K.S.A. 2012 Supp. 44-555c(k).

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Melinda G. Young, Attorney for Claimant  
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C. Stanley Nelson, Special Administrative Law Judge